1992

The State of Utah v. Nicholas Garcia Ramirez : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920148-CA
v.	:	
NICHOLAS GARCIA RAMIREZ,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ASSAULT, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1990), ENTERED AS A CLASS A MISDEMEANOR PURSUANT TO UTAH CODE ANN.§ 76-3-402 (SUPP. 1992), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER WILKINSON, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of aggravated assault, in violation of Utah Code Ann. § 76-5-103 (1990), entered as a class A misdemeanor pursuant to Utah Code Ann. § 76-3-402 (Supp. 1992). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(f) (1992).

STATEMENT OF THE ISSUE PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

The only issue on appeal is:

Did the trial court commit reversible error in concluding that the victim's identification of defendant was reliable and, therefore, admissible?

In reviewing a trial court's determination of the constitutional admissibility of eyewitness identification, the court's factual findings are reversed only if clearly erroneous; its legal conclusion is reviewed for correctness. State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); State v. Adams, 830 P.2d 310, 311 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of any constitutional provision, statute or rule relevant to a determination of this case is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with attempted second degree murder, a second degree felony, in violation of Utah Code Ann. § 76-5-203 and § 76-4-102 (1990), and aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1990) (R. 6-7). Realizing that State v. Bell, 785 P.2d 390, 393 (Utah 1989) precluded the charging of attempted felony-murder, the State amended the homicide count to aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990) (R. 4, 8-9, 42-46).

Defendant moved to suppress the victim's eyewitness identification (R. 53-61). After a two-day evidentiary hearing, the motion was denied (R. 70, 72, 78, 326-333). Defendant petitioned the Utah Supreme Court for interlocutory review; the petition was denied (R. 80, 83-89).

On February 14, 1992, defendant entered a conditional no contest plea to aggravated assault, reserving his right to appeal the denial of the motion to suppress (R. 106, 121-25). The conviction was entered as a class A misdemeanor and the robbery count was dismissed. Defendant was given credit for time served and released from custody the same day (R. 107, 121-26). Defendant timely filed a notice of appeal (R. 109-10).

STATEMENT OF THE FACTS

Shortly before noon on December 1, 1990, three individuals assaulted Leslie Norwood (R. 199, 255). One hit Mr. Norwood on the head; another stabbed him five times with a small knife (R. 199, 205, 209, 240). At the time, Mr. Norwood was drunk (R. 173, 181).

Mr. Norwood told the police that a "male mexican" named "Chico" had stabbed him; he said they had met the night before at a transient camp (R. 134-35, 137, 201-03, 253-55, 263). Mr. Norwood was shown a photo-spread but he did not identify anyone (R. 138-39). Defendant's picture was not in the photo-spread (R. 151, 163).

Defendant was arrested on December 20, 1990 (R. 139). In late January, 1991, the police drove Mr. Norwood to the preliminary hearing courtroom. During the drive, a detective told Mr. Norwood, "[W]e have arrested the person who has stabbed you" (R. 140-42, 162, 237). In the courtroom, defendant was the only male in handcuffs and jail garb (R. 238-39). When Mr. Norwood saw him, he immediately told his companion that defendant was the person who stabbed him (R. 209-10).

In late March, 1991, Mr. Norwood identified defendant in a lineup (R. 142-43).

Additional facts concerning the eyewitness identification will be discussed in the argument portion of this brief as relevant to the specific findings of the trial court.

SUMMARY OF ARGUMENT

Due process requires a trial court to determine the reliability of an eyewitness identification prior to its admission at trial. The trial court must examine the circumstances surrounding the criminal episode and the subsequent identification and then determine if, under the totality of these circumstances, the identification is reliable. The trial court's conclusion of admissibility is independent of the jury's ultimate determination of the weight to accord the identification.

On appeal, the trial court's factual findings must be upheld unless contrary to the clear weight of the evidence. However, its legal conclusion of reliability and, therefore, admissibility is reviewed for correctness. Here, the trial court's factual findings:

> (1) that the victim had the physical and mental capacity to accurately observe the events, and
>
> (2) that the subsequent identification of defendant was not a product of suggestion

are contrary to the clear weight of the evidence. Because these two factors are integral to the determination of reliability, there are insufficient facts to support the trial court's conclusion of admissibility.

ARGUMENT

THE TRIAL COURT'S FACTUAL FINDINGS THAT (1) THE VICTIM HAD THE CAPACITY TO OBSERVE HIS ASSAILANT AND (2) THE VICTIM'S IDENTIFICATION OF DEFENDANT WAS NOT A PRODUCT OF SUGGESTION, ARE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE. BECAUSE THE ERRONEOUS FACTUAL FINDINGS ARE INTEGRAL TO THE IDENTIFICATION, THERE ARE INSUFFICIENT FACTS TO SUPPORT THE LEGAL CONCLUSION THAT THE IDENTIFICATION WAS RELIABLE.

Due process requires a trial court to determine the reliability of eyewitness identification evidence prior to allowing its admission at trial. Neil v. Biggers, 409 U.S. 188, 198-99, 93 S. Ct. 375, 381-82 (1972) (federal due process requires that only reliable identifications are admitted into evidence); State v. Ramirez, 817 P.2d 774, 780 (Utah 1991) (state due process mandates an analytical "in-depth appraisal of the identification's reliability" prior to its admission); State v. Long, 721 P.2d 483, 490 (Utah 1986) (setting out the empirical factors necessary to a state constitutional assessment of identification evidence).

Defendant properly preserved a challenge to the eyewitness identification of defendant by the victim, Leslie Norwood, on both state and federal constitutional grounds (R.53-61). While defendant attacks several aspects of the identification, his primary arguments are: (1) that due to intoxication, the victim lacked the capacity to reliably observe and recall his assailant; and (2) that the circumstances surrounding the victim's subsequent identification of defendant were suggestive. The State agrees that the trial court's

findings concerning these two factors are against the clear weight of the evidence.[1]

Since the state constitutional standard is more stringent than the federal, only the state constitutional analysis will be addressed. For even if the federal standard were met, failure to meet state constitutional requirements would still mandate reversal. Ramirez, 817 P.2d at 784. To comply with state due process, a trial court must determine the reliability of the eyewitness identification by making a detailed assessment of the totality of facts surrounding the criminal episode as well as the identification. Id. at 781. This includes consideration of:

> "(1) the opportunity of the witness to view the actor during the event;
>
> (2) the witness's degree of attention to the actor at the time of the event;
>
> (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
>
> (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and,
>
> (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly."

Id. (quoting Long, 721 P.2d at 493).

To properly assess any errors, the trial court's factual findings concerning each Ramirez factor will be examined

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[1] The trial court orally announced its findings and conclusion during the evidentiary hearing (R. 326-33). No written findings were entered (R. 78). A copy of the oral ruling is attached as an addendum of this brief.

in light of the record facts. In doing so, the evidence must be viewed as a whole and "in the light most favorable to the trial court's decision" of reliability. Id. at 781-82. Only when a factual finding conflicts with the clear weight of the evidence is it erroneous. Id. at 782. Whether the facts, when so viewed, are "sufficient to demonstrate reliability is a question of law," which is reviewed for correctness. Id.

A. The Trial Court's Analysis of the Opportunity of the Victim to View the Actor

The first factor in determining the reliability of eyewitness identification is the opportunity of the witness to view the actor during the event, including consideration of the length of period of observation, the distance between the witness and actor, the lighting conditions, whether the witness had ever seen the actor in the past, whether the witness saw the actor's face, and whether the actor's features were visible or disguised. Ramirez, 817 P.2d at 782; Long, 721 P.2d at 494.

The trial court stated that it was considering two events: (1) the time when Mr. Norwood claimed to have met defendant at the transient camp; and (2) the time of the stabbing (R. 327). As to the first, the court found that the night before the stabbing, Mr. Norwood had been drinking (R. 327). Mr. Norwood was sleepy when defendant came to the camp and briefly met him (R. 327). These findings are supported by the record (R. 199-204, 211-17). Turning to the stabbing, the court found that Mr. Norwood's assailant was only eight inches away from him when the assault occurred (R. 328). This finding is supported by the

record (R. 205). Additionally, it is undisputed that the assault took place in the daytime and was brief (R. 204-05).

The court then stated:

> . . . [Mr. Norwood] says the words, the fact that -- to the effect, "Damn, Chico, you stabbed me." He knew his name. He remembered his name.
>
> Now, he also reiterated this same statement at the hospital, Chico stabbed me. He must have remembered something from the night before when he met the individual.

(R. 328). While it is uncontroverted that Norwood made these statements (R. 134-37, 150, 205, 240-42), the court improperly considered this as demonstrative of the witness's opportunity to observe. However, a witness's level of certainty, while a legitimate factor under the federal constitutional standard, is not to be considered in a state constitutional analysis. Ramirez, 817 P.2d at 781. The fact that the victim called his assailant "Chico" during the encounter and continued to believe that "Chico" was his assailant does not validate the identification of defendant to any greater degree than any victim's belief that he recognizes the actor as someone he previously knew. To accept the victim's certainty that it was "Chico" who stabbed him is to beg the question of whether that belief is reliable. Accord Long, 721 P.2d at 490 ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection."). But, the consistency of the victim's statements is relevant under the fourth Ramirez factor, whether the identification was suggestive or a product of the

witness's own memory.

B. The Trial Court's Analysis of the Witness's Degree of Attention to the Actor at the Time of the Event

The second factor in assessing reliability calls for the trial court to determine the witness's degree of attention to the actor at the time of the event, including whether there were any distracting noises or activities during the observation. Ramirez, 817 P.2d at 782-83; Long, 721 P.2d at 494. The trial court viewed this factor as also encompassing the issue of whether the witness viewed the event as significant (R. 328-29). While this is consistent with Long, under Ramirez it is considered as the separate fifth factor. Compare Long, 721 P.2d at n.8, with Ramirez, 817 P.2d at 781. In relation to these facts, the distinction is not critical.

The trial court found that the victim had paid close attention during the stabbing (R. 328-29). The evidence supports this finding. Contrary to defendant's assertions that Mr. Norwood never saw his assailant's face (Br. of Appellant at 4, 10, 14, 21), Mr. Norwood testified that he did not see who hit him but did fully observe the face of the person who stabbed him (R. 199, 205, 209, 240). At the time, they were face to face and only eight inches apart (R. 205, 209). Additionally, the court's finding that the stabbing was a significant event creating a greater degree of attentiveness on the part of the victim was proper. Long, 721 P.2d at 489.

C. The Trial Court's Analysis of the Witness's Capacity to Observe the Event

While the trial court's analysis of the first two Ramirez factors is factually supportable, its finding that Mr. Norwood had the physical and mental capacity to reliably observe his assailant is contrary to the clear weight of the evidence and is, therefore, clearly erroneous.

Ramirez mandates that in evaluating a witness's physical and mental acuity, the trial court must consider any impairments due to stress, fright, fatigue, injury, drugs, alcohol, uncorrected visual defects, personal motivations, biases or prejudices. Id. at 783; Long, 721 P.2d at 488, 494. Here, the trial court entered a finding concerning only one fact, Mr. Norwood's intoxication. The court stated:

> There was no question he was drunk. I was not persuaded he had taken any drugs. There's no question there were track marks on his arm, but there's been a reasonable explanation given. There was no evidence -- he said he didn't take drugs. There's no evidence that he did take drugs. I am not persuaded that he did. I am persuaded he did drink a lot and was intoxicated at the time. I am persuaded that he had a high tolerance for drinking, that he drank continually, that it was his normal way of life, so to speak, and even the expert said that a percentage of the Indian race has a higher tolerance although he couldn't say that a person of the Cherokee race -- specifically of the Navajo.

(R. 329).

The evidence of the victim's intoxication and its impact on his capacity to observe were only challenged by Mr. Norwood's claim that he had not been drinking the morning of the

stabbing (R. 220). The evidence established that Mr. Norwood was a chronic alcoholic (R. 182, 184). On the night he met defendant at the transient camp, he had been drinking vodka and beer (R. 203, 213). He was tired (R. 216). Expert testimony established that when a person has been drinking, his ability to accurately recall an event is substantially diminished (R. 185, 273). Accord Long, 721 P.2d 488-90 (discussing similar empirical data concerning numerous factors which may diminish a person's ability to accurately remember and recall). Studies have established that as little as an hour later, the imbiber's memory of what he observed while drinking is affected (R.196-97). Here, the expert testified that the fact that Mr. Norwood was drinking at the time he met defendant would affect his ability to accurately identify defendant the next day (R. 196-96, 275).

Immediately following the stabbing, the victim was taken to the hospital. The attending doctor found Mr. Norwood to be "stuporous," meaning that he was closer to "comatose or nearly dead" than lucid (R. 173, 178-79). The doctor opined that this was the result of intoxication rather than his injuries (R. 174, 179). Chemical analysis established Mr. Norwood's blood alcohol level at .364 percent, four times the legal limit (R. 173). Relatively the same level was present at the time of the stabbing (R. 181). Mr. Norwood was unaware of his surroundings and non-responsive except to pain (R. 173-74).

A toxicology expert testified that a .364 percent blood alcohol level would severely inhibit a person's capacity to

accurately observe or recall events (R. 185-86). The expert testified:

> [N]o individual could sustain that blood alcohol concentration unless they were an individual who drank excessively for many, many years on a routine daily basis or if in fact they were a diagnosed alcoholic of some considerable years. Only even then would an individual in my experience be able to stand upright, if you will, be able to tolerate physically that amount of alcohol.

(R. 184). But, such chronic alcoholics would still

> suffer very severe impairments in their mental abilities and other of their faculties, whether or not they showed physical disabilities.

(R. 185). The court's finding that this level of intoxication would not affect Mr. Norwood's mental processes to the same degree as a non-alcoholic is clearly contrary to the weight of the evidence.

The related finding that Mr. Norwood's half-Cherokee status insulated him from full impairment of his mental processes is also contrary to the evidence. The toxicologist testified that studies have demonstrated that some Southwestern Native Americans, such as the Navajos, can tolerate more alcohol than Caucasians in the sense that at the point when a Caucasian drinker would be in a coma, a Navajo drinker may still be able to walk (R. 191). When asked if the same was true of Cherokees, the toxicologist stated that he did not know (R. 192). Again, as in the case of chronic alcoholics, the toxicologist explained that even though the observable physical impairments might differ, the ability to accurately process information remained equally

affected (R. 185, 191-94).

The court additionally failed to consider the effects of stress, fright, fatigue and injury. Mr. Norwood admitted that he was physically ailing prior to the stabbing. While denying that he had been drinking on the morning of the stabbing, Mr. Norwood testified that he was hung-over (R. 220). He had a headache, felt weak and had dry heaves (R. 222-23). He was surprised when he was "jumped" (R. 242). The hit prior to the stabbing left him "dazed" and "fading" (R. 241-42). An expert testified that the effects of the hang-over together with the stress and injury of being hit would all affect the victim's capacity to accurately observe (R. 269-274).

Both experts agreed that, under these circumstances, it would be extremely unlikely that Mr. Norwood could make a reliable identification of his assailant (R. 189, 196, 283-84). While the court was not obligated to accept the experts' opinions of incapacity, the court did subsequently state that the testimony was "very strong," and "good [and] reliable" (R. 333). It was also uncontradicted. As such, the only factual finding supportable by the evidence was that Mr. Norwood's capacity to observe during the stabbing was substantially impaired. See State v. Cummins, No. 900419-CA, slip op. at 16 n.25 (Utah App. August 25, 1992) (noting the severe effects of a blood alcohol level exceeding .30 percent).

D. The Trial Court's Analysis of Suggestibility in the Identification Process

The fourth Ramirez factor involves a consideration of any suggestibility in the identification process. It entails inquiries into whether the witness's identification was spontaneous and remained consistent; including considerations of the length of time between the original observation and the identification; the witness's mental capacity and state of mind at the time of the identification; the witness's exposure to opinions and descriptions of others, including photographs, newspaper accounts and other information or influences that may have affected the independence of his identification; any instances when the witness failed to identify the defendant; any instances when the witness gave a description of the actor inconsistent with the defendant's appearance; and the circumstances under which the defendant was presented to the witness for identification. Ramirez, 817 P.2d at 783-84; Long, 721 P.2d at 494-95 n.8.

The trial court found that the victim consistently insisted that the person who stabbed him was the person he had met at the transient camp (R.329-30). The court found that the physical descriptions of the assailant given by the victim "did not differ that much from the two times that it was given" and was not "that far off" from defendant's appearance (R. 330-31). The court found that while months had elapsed between the incident and identifications, the victim had actually made an immediate identification during the crime by calling out, "Chico,

why are you doing this to me?" (R. 330).

Additionally, the court found that when the victim had the opportunity to observe defendant in the preliminary hearing courtroom, he immediately identified him (R. 332). The court found that prior to the courtroom identification, Detective Howell told the victim, "[W]e have arrested the person that assaulted you" (R. 332). The victim then went into the courtroom, observed defendant in jail garb, and told a companion that defendant was the one who stabbed him (R. 332). Because the victim had previously observed defendant in the courtroom, the trial court stated that the subsequent lineup identification was not "significant" (R. 332).

The record established the following facts. The victim was first interviewed by Detective Mendez at the hospital approximately a week after the stabbing (R. 248-49). Detective Mendez, Dr. Schaeffer, and Mr. Norwood testified that he was lucid and coherent at the time of the interview (R. 177, 207, 262). Mr. Norwood identified his assailant as "Chico" whom he had met the first day he was in Salt Lake, which would have been several days before the stabbing (R. 255, 263-64). He described "Chico" as a male "Mexican" with a heavy accent, 160-170 pounds in weight, with short dark hair (R. 251-52). Mr. Norwood stated that he was 5'10" tall and "Chico" was slightly shorter, about 5'8" or 5'9" (R. 207, 235). Detective Mendez did not recall asking if "Chico" had any tatoos but remembered Mr. Norwood stating that he did not (R. 253).

About four days later, Detective Howell interviewed Mr. Norwood (R. 134). This time, Mr. Norwood described "Chico" as being about 5'5" in height, 130-140 pounds, hispanic, with dark hair and mustache, and about 30 years old (R. 147-49). He maintained that he had met "Chico" at the camp but said it was the night before the stabbing (R. 134-35, 137, 167).

When Mr. Norwood testified, he did not offer an explanation for the differences in the descriptions given to Detectives Mendez and Howell. He did testify that during the stabbing he had "a good look" at "Chico's" right hand and did not observe any tatoos (R. 245).

The arresting officer described defendant as "extremely short" and "heavy set" (R. 257). Defendant is 5'2" in height and weighs 150 pounds (R. 244, 258). He is Hispanic but has only a slight accent which is difficult to discern if only a few words are spoken (R. 247A). Both his hands are tattooed. The right hand has a two-inch by one-inch cross, another half-inch cross, and a one-half inch wide line going up and around his wrist; the left hand has an inch by half-inch black star and a two and one-half inch by one-half inch solid ribbon (R. 120-21). Defendant testified that in December, 1990, he had dark shoulder length hair and a one-inch beard; the arresting officer testified that defendant did not have a beard when arrested and may have had short hair, but he was unsure (R. 119, 257-58).[2]

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[2] A photograph of defendant was admitted into evidence (Exhibit 3). This photograph was taken in March, 1991, at the time of the lineup (R. 118).

The court's finding that the physical descriptions given by the victim were consistent and reasonably matched that of defendant is not completely supported by the record. However, during the evidentiary hearing, the parties had Mr. Norwood and defendant stand side-by-side (R. 244). The court then made its own observations of their relative size and the descriptions given:

> Now, the two individuals stood before the court and it was indicated that Mr. Ramirez said he was 5'2" and -- Mr. Norwood said he was 5'10". . . . Yes, he is shorter than him. Looking at the individual, whether he is 5'2" to 5'5" in that area, is pretty difficult.

(R. 331). The trial court was in a unique position to observe first-hand defendant's physical characteristics and compare them to the witness's description. See Ramirez, 817 P.2d at 784 (recognizing the trial court's unique ability to appraise demeanor and credibility evidence). For this reason, the court's finding that the physical descriptions did not "differ that much" and were "reasonable" should be given deference.

Turning to the issue of suggestibility in the preliminary hearing courtroom encounter between defendant and the victim, the circumstances surrounding the incident were essentially undisputed. Detective Howell testified that he brought Mr. Norwood to the courtroom pursuant to a subpoena in this case and not specifically to make an identification (R. 140-42). Before entering the courtroom, the detective told Mr.

Norwood, "[W]e have arrested the person who stabbed you" (R. 157), or ""[W]e have a person in custody by the name of Chico" (R. 162). Mr. Norwood then entered the courtroom and observed only defendant being brought in handcuffed and in jail garb (R. 238-39). Mr. Norwood turned to his companion and said, "That's the one that stabbed me coming through the door" (R. 209). He did not relate this information to the police until the March lineup (R. 209-10, 239).

The test for determining if a pretrial identification is sufficiently suggestive as to violate due process is whether the circumstances surrounding the identification were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Thamer, 777 P.2d 432, 435 (Utah 1989) (citing Simmons v. United States, 390 U.S. 377, 383, 88 S. Ct. 967, 970 (1968)). If the pretrial identification is found to be suggestive, any subsequent identification "must be based on an untainted, independent foundation to be reliable." Id. (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977)).

Dr. Dodd, a psychologist and eyewitness expert, testified that the in-court identification was suggestive for several reasons: (1) it was a one-on-one situation; (2) the victim had been told that his assailant was in custody; (3) defendant was presented in jail garb and custody; and (4) defendant was presented as the person who the State had already determined should be prosecuted (R. 278-79). The Utah appellate

courts have expressed similar concerns. See Ramirez, 817 P.2d at 784 (explaining the suggestiveness in procedures focusing on a single, in-custody defendant); Thamer, 777 P.2d at 435 (noting that any identification procedure should not emphasize one person over another and warning against subtle police influences); Long, 721 P.2d at 490 (discussing the subtle distortions which may occur in the retention or recall stage of identification).

The trial court implicitly found the courtroom encounter not to be suggestive (R. 331-33). The court appears to have ruled that any problem with the pre-encounter statement of Detective Howell's that the police had arrested Mr. Norwood's assailant was overcome by Mr. Norwood's "immediate" identification of defendant when he was brought into the courtroom (R. 332). As it did in ruling on the victim's capacity to observe, the trial court accepted as credible the expert's opinion that the encounter was suggestive but gave it little weight (R. 333). The court concluded that this case did not have features of the "more questionable" show-up identification in Ramirez (R. 333).

The trial court's finding that Mr. Norwood's identification of defendant was a product of his own memory is contrary to the weight of the evidence. As the court noted, this factor carries great weight in determining the reliability of an identification (R. 332). See Ramirez, 817 P.2d at 784. Here, defendant had been drinking when he first observed "Chico," and was drunk when assaulted. Almost two months later, while he is

being transported to court to testify in the assault case, he is told that the police have arrested his assailant. He then enters the courtroom and the only male in custody is defendant. The court's emphasis on the fact that an identification was immediately made begs the question of whether it was the product of suggestion.[3]

E. The Trial Court's Analysis of the Nature of the Event Observed

The final factor for the trial court to consider is the nature of the event observed and the likelihood that the witness would perceive, remember and relate it correctly, including whether the event was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the observer's. Ramirez, 817 P.2d at 781 (quoting Long, 721 P.2d at 493).

The court here considered one aspect. The court found that since the stabbing was so significant an event, the victim "would remember [his assailant] more as a result of this particular event" (R. 333). As discussed above (supra at 11), this was proper.

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[3] Defendant also raises the issue of whether his sixth amendment right to counsel was violated in the preliminary hearing courtroom encounter (Br. of Appellant at 19 n.3). Defendant's failure to timely raise this issue below renders it waived for purposes of appeal. State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). See also State v. Mincy, 192 Utah Adv. Rep. 17, 20 (Utah App. July 22, 1992) (holding that no right to counsel exists at a show-up).

F. The Trial Court's Conclusion of Reliability and Admissibility

In concluding that the identification of defendant was admissible, the trial court ruled that it could not fully accept the "strong" and "good reliable testimony" of the two expert witnesses that Mr. Norwood's capacity to make a reliable identification was substantially impaired and that the in-court identification was a product of suggestion because those circumstances "would not do away with the fact that he had met this individual . . . [and] remembered his name the next morning -- he said Chico" (R. 333). This conclusion improperly considered the certainty of the witness's identification[4] and failed to consider the significant weight of the victim's lack of capacity to accurately observe together with suggestibility in the identification process. Even when the facts are viewed in the light most favorable to the trial court's decision, they remain insufficient as a matter of law to warrant a preliminary finding of reliability and, therefore, admissibility.

CONCLUSION

Based on the court's erroneous conclusion that the eyewitness identification was admissible, the trial court's denial of defendant's motion to suppress should be reversed and

[4] Under the state constitutional standard, the certainty of the witness in making an identification cannot be considered. See discussion, supra at 10.

the case remanded for proceedings consistent with that ruling.

DATED this 18th day of September, 1992.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to Joan C. Watt, Elizabeth A. Bowman and Vernice S. Ah Ching, attorneys for appellant, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 24th day of September, 1992.

ADDENDUM

should be given to the jury.

THE COURT: Let me indicate that counsel and the defendant have submitted four cases to the court, two of which the court was quite familiar with, prior to taking the bench, and that I have read before in other cases and which I have reviewed over the evening. In fact, I read the Ramirez case Tuesday before taking the bench and participating in this case. The court did read State v. Rimmasch and State v. Thamer. I don't think they add that much to the matter before the court today. I think the two cases that are controlling are State v. Long and State v. Ramirez of which I will say I dealt with in other cases and did read the Ramirez case before taking the bench yesterday, and the court reread it last night, again. Now let me state that I think I understand -- I know I understand what the court is saying in State v. Ramirez as far as the responsibility of the trial court in its determinations as far as the matters of law and to rule on those questions and not submit them to the jury. But I am not sure that as I hear the argument here today and I apply it to this case, that we, again, to talk of facts and law, I am not sure that either I am smart enough to distinguish them or the argument that I am hearing is not distinguishing these facts. I think the court has the responsibility of ruling as a matter of law, if the law is

very clear, as to what the situation is as far as identification. Where it is a factual matter, where reasonable minds could differ, I think it is a jury question, and I don't think Ramirez goes to the point of saying that questions of fact should not be submitted to the jury. Of course, maybe that would be determined later and I would hope it doesn't say that.

So I am looking at this case this way. I am ruling on it where it is question of fact, I am looking at those questions of facts and making my determination and feel that where reasonable minds will differ, I would submit them to the jury.

Now, both of you have argued the Ramirez case as far as the points of which they bring out. And let me go through those with you, the way I am looking at them in this particular case that you both use those.

First of all, number one, the opportunity of the witness to view the actor and the event, I look at two events here. I look at the meeting of the defendant at the fireside or the -- at the fire and at the time of the stabbing, now, there's no question it was a short time when he met him the evening before. And he admitted he had been--the victim had been drinking and he was sleepy but he did see him. He did meet him. That's about all right at that point you get out of that meeting. But then he

stabbed -- he sees him for eight seconds -- no, eight inches away from him and there he says the words, the fact that -- to the effect, "Damn, Chico, you stabbed me." He knew his name. He remembered his name.

Now, he also reiterated this same statement at the hospital, Chico stabbed me. He must have remembered something from the night before when he met the individual.

Now, number two, the attention to the gun man, and this is somewhat repetitious of the first, but when I say attention, I am looking at the Ramirez case--I guess I shouldn't say that but the attention given, there was not a great deal of attention given of the night before. I think when a person is stabbed they begin to give attention. I refer you to the case of State v. Long where the court in rather extensive discussion goes into an academic discussion concerning things that we remember as they take place, and he says if you ask a person what they were doing when John F. Kennedy was assassinated, they would probably remember. But if you ask them the color of the car that was in front of them when they stopped at the red light to drive to work this morning, they wouldn't remember. Well, I don't dispute that. I agree with it, that if I saw an individual walking down the street with a knife all strapped to his belt, I probably wouldn't remember that individual but if that individual pulled that knife out and

stabbed me and I knew him, I met him the night before and he stabbed me, I would remember him. That is likening to the situation when John Kennedy was assassinated. I think the event brought out to the victim was such a significant event in his life that he looked very close at that and was remembering it.

And, three, the reliability factor, does he have the capacity to remember --had the capacity to remember the event? There was no question he was drunk. I was not persuaded he had taken any drugs. There's no question there were track marks on his arm, but there's been a reasonable explanation given. There was no evidence--he said he didn't take drugs. There's no evidence that he did take drugs. I am not persuaded that he did. I am persuaded he did drink a lot and was intoxicated at the time. I am persuaded that he had a high tolerance for drinking, that he drank continually, that it was his normal way of life, so to speak, and even the expert said that a percentage of the Indian race has a higher tolerance although he couldn't say that a person of the Cherokee race -- specifically of the Navajo.

Number four, where the identification is made spontaneously, made consistent at the time of the stabbing, he said, "Damn it, Chico, you stabbed me." He said, "Chico stabbed me," in the hospital. He told the officer, "Chico

stabbed me." So it was consistent as far as what he was saying.

Five, identification of how long after identification took place, well, as far as the actual identifying of the defendant in this case, it took place I guess some days, weeks after but as far as the indentification of stating who he was, who had stabbed him, he identified him immediately. He didn't see him. I guess it was either -- it was months when he saw him. He identified him. It didn't vary from him identifying the particular individual who had perpetrated the stabbing.

Number six, the descriptions, whether they are confused or not. Counsel for the defense makes a great deal out of the descriptions, and they should and it does carry a lot of weight, but as I look at these descriptions I am not persuaded the descriptions are that far off. Now, my notes stated that he told Officer Howell he was approximately 5'5", weight is hundred thirty, hundred forty, Hispanic race, dark hair, mustache, no tatoos, small, name Chico, couldn't identify him from the photo spread, saw a person that looked like him on the photo spread. To Officer Mendez, he told him weight; hundred sixty, hundred seventy; height, 5'8" to 5'9"; hair color, dark; hair, short; age, he didn't ask him -- he said race Mexican. Marks, didn't ask him. He said tatoos, none;

facial hair, he didn't ask him. He said he had a Mexican accent. He doesn't ask him anything about the clothing. So that many things Officer Mendez did not go into, of which Officer Howell did go into.

Now, the two individuals stood before the court and it was indicated that Mr. Ramirez said he was 5'2" and -- Mr. Norwood said he was 5'10". The eight inches difference, counsel brought out the fact that the boots were on. Of course, counsel argued against that. The court did see the boots. There's no question that those boots were higher from the type of shoe than the type of shoe that the defendant had on which could have amounted to at least an inch so you have a seven-inch difference. Yes, he is shorter than him. Looking at the individual, whether he is 5'2" to 5'5" in that area, is pretty difficult.

I think he said his weight is a hundred sixty and his weight the second time he said hundred sixty to hundred seventy. First time, he said a hundred fifty to hundred sixty -- now I take that a hundred thirty to hundred forty. First time he said, there's a weight difference somewhat, but that is something that is flexible so what I am saying is that the description of the individual as far as what was asked him did not differ that much from the two times that it was given.

Now, number seven, the question of

suggestibility. This does carry great weight I think as far as identification is concerned. The only suggestion that has been made in this case was when Officer Howell took the victim to court and said that, "Well, I will have to check my notes exactly what he said, because I believe we have arrested the person that assaulted you," something to that effect. Officer Howell was not with him, but the victim, Mr. Norwood, and his partner went into the courtroom, sat down. They brought the defendant in. Yes, he was dressed in jail garb and he immediately said to his partner, that's the man who stabbed me, his identification then became immediate the first time that he had seen him since the event. Then he looked at the photo spreads and he did not see him in the one and he identified the other which I think the photo spreads at that time were probably superfluous but I do think it is significant when the first time he saw the photo spread he said that this man looks like him but it is not him.

MR. VUYK: I think what we are talking is the lineups rather than additional photo spreads. There were two lines up.

THE COURT: I am sorry, yes, that is correct. And so as I say, it is not as significant after of course he identified him and had seen him in the courtroom, he then did definitely identify him. Now, I think that the

experts which have been brought to this court give very strong testimony and the court is not sitting here to try to dispute that testimony, that the testimony is probably good reliable testimony, that it is not something that this court can accept in every particular case and it's not something that would do away with the fact that he had met this individual. He remembered his name the next morning -- he said Chico. He tells the officer, "Chico stabbed me." And he was able to of course, also, give a description of which this court feels was a reasonable description and also able to identify him when he first saw him.

Now, as I compare this case to the identification in State v. Ramirez I think the identification there was much more difficult, much more questionable than in this case and also, as I say, I am putting some weight on the question of the argument that the court -- the Supreme Court uses in the Kennedy situation. I think that he would remember him more as a result of this particular event and based on that the court does find that the -- denies the motion to suppress the evidence as far as the identification and will allow this matter to be submitted to the jury. Any questions?

MS. AH CHING: None.

MR. VUYK: While we are here can we set a trial